

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: : 08-11153 (MG)
: One Bowling Green
LEXINGTON PRECISION CORPORATION, : New York, New York
:
Debtors. : July 30, 2009
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TRANSCRIPT OF HEARING REGARDING THIRD APPLICATION OF
WEIL, GOTSHAL & MANGES, LLP, AS ATTORNEYS FOR THE
DEBTORS, FOR INTERIM ALLOWANCE OF COMPENSATION
FOR PROFESSIONAL SERVICES RENDERED AND REIMBURSEMENT
OF ACTUAL AND NECESSARY EXPENSES INCURRED FROM
DECEMBER 1, 2008 THROUGH MARCH 31, 2009;
THIRD INTERIM APPLICATION OF STOUT RISIUS ROSS, INC.,
UNDER 11 U.S.C. 330 FOR INTERIM ALLOWANCE OF
COMPENSATION AND REIMBURSEMENT OF EXPENSES AS
FINANCIAL ADVISOR TO THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS FOR STOUT RISIUS ROSS, INC., OTHER
PROFESSIONAL, PERIOD 12/1/2008 TO 3/31/2009,
FEE: \$200,000.00, EXPENSES, \$2,048.12 FILED BY
PAUL N. SILVERSTEIN; THIRD APPLICATION FOR INTERIM
PROFESSIONAL COMPENSATION FOR W.Y. CAMPBELL &
COMPANY, CONSULTANT, PERIOD 12/1/2008 TO 3/31/2009, FEE
\$200,000.00, EXPENSES \$10,609.44, FILED BY W.Y. CAMPBELL
& COMPANY; THIRD APPLICATION FOR INTERIM PROFESSIONAL
COMPENSATION SUMMARY SHEET FOR ANDREWS KURTH, LLP, UNDER 11
U.S.C. 330 FOR THIRD INTERIM ALLOWANCE OF COMPENSATION AND
REIMBURSEMENT OF EXPENSES AS COUNSEL TO THE OFFICIAL COMMITTEE
OF UNSECURED CREDITORS FOR ANDREWS KURTH LLP, CREDITOR COMM.
ATTY. PERIOD 12/1/2008 TO 3/31/2009, FEE \$379,157.50, EXPENSES
\$199,039.04; HEARING REGARDING OBJECTION TO CLAIM NUMBER 262;
MOTION OF THE DEBTORS FOR AUTHORIZATION TO INCUR SECURED DEBT
FROM WESTFIELD BANK, FSB FOR THE PURPOSES OF FINANCING THE
DEBTORS' INSURANCE PREMIUMS FOR THEIR WORKMENS COMPENSATION
LIABILITY, EMPLOYMENT PRACTICES LIABILITY, UMBRELLA LIABILITY,
AND EXCESS UMBRELLA LIABILITY FILED BY ADAM P. STROCHAK
ON BEHALF OF LEXINGTON PRECISION CORPORATION
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

(Appearances on next page.)

Proceedings recorded by electronic sound recording,
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3 APPEARANCES:

4 For Debtors:

ADAM P. STROCHAK, ESQ.
Weil, Gotshal & Manges, LLP
1300 Eye Street NW
Suite 900
Washington, D.C. 2005

7 For the Creditors'
Committee:

PAUL SILVERSTEIN, ESQ.
Andrews Kurth
450 Lexington
New York, New York

9

10 For the U.S. Trustee:

ELISABETTA G. GASPARINI, ESQ.
United States Department of Justice
Office of the U.S. Trustee
33 Whitehall Street
21st Floor
New York, New York 10004

13 For Frank Boder:

DAN SHAKED, ESQ.
Shaked & Posner
255 W. 36th Street
8th Floor
New York, New York 10018

16 For W.Y. Campbell:

ALLISON BACH, ESQ.
Dickinson Wright, PLLC
500 Woodward Avenue
Suite 4000
Detroit, Michigan 48226

19

20 Court Transcriber:

RUTH ANN HAGER
TypeWrite Word Processing Service
211 N. Milton Road
Saratoga Springs, New York 12866

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1 (Proceedings began at 2:00 p.m.)

2 THE COURT: Please be seated. All right. We're here
3 in Lexington Precision, number 08-11153.

4 Mr. Strochak?

5 MR. STROCHAK: Good afternoon, Your Honor. Adam
6 Strochak, Weil Gotshal for the debtors. The first matter, I
7 believe, is the debtor's motion for approval of insurance
8 premium financing -- secured insurance premium financing under
9 Section 364(c)(2). This is the renewal of the debtor's
10 insurance programs effective July 1, 2009, for Workers'
11 Compensation employment practices, fiduciary crime umbrella
12 liability, and excess umbrella liability coverage. The debtors
13 will incur total premiums, annual premiums of about \$830,000.00
14 for that insurance coverage and they propose to finance it with
15 secured financing from Westfield Bank in accordance with a
16 standard form agreement for insurance premium financing and
17 they're going to finance \$623,000.00 -- well, almost
18 \$624,000.00 of the premium or 75 percent of the premium.

19 The agreement, I believe, was attached to the motion.
20 There's been no objection and we'd ask approval for that
21 financing.

22 THE COURT: Yes, Mr. Strochak. I reviewed the motion
23 and supporting papers. No objection having been received, that
24 motion is granted.

25 MR. STROCHAK: Thank you, Your Honor. Would you like

1 me to hand up an order or do it at the end of the hearing?

2 THE COURT: At the end of the hearing.

3 MR. STROCHAK: Okay. There are two other matters on
4 the agenda. We have four fee applications, I believe, and then
5 there is the motion for relief from stay of Ms. Ceremelli
6 [Ph.], a claimant.

7 THE COURT: Let's deal with that next.

8 MR. STROCHAK: The stay next?

9 THE COURT: Yes. I'll turn the podium over to Mr.
10 Shaked who represents Ms. Ceremelli.

11 MR. SHAKED: Good afternoon, Your Honor. Dan Shaked
12 appearing as local counsel to Frank Boder in Ohio. Your Honor,
13 this was commenced by a motion objecting to Ms. Ceremelli's
14 claim which was timely filed. Ms. Ceremelli has a wrongful
15 termination action pending in the Ohio state court. The
16 debtors filed a motion objecting to their -- to her claim and
17 we filed responses as well as a motion to keep the automatic
18 stay to bring this case back to Ohio so we can terminate and
19 conclude the proceeding.

20 THE COURT: But after nine years you're -- they're
21 ready to move ahead?

22 MR. SHAKED: After nine years I believe everybody is
23 ready to move ahead including the Court in Ohio, especially the
24 Court in Ohio who would like to wrap this up and will put this
25 on its priority list being one of its older cases.

1 I'm not sure I want to go into the merits of the case
2 at this point, but one of the things we wanted to discuss would
3 be the motion itself and the Sonnax factors of whether this
4 should be litigated in the Ohio state court as opposed to
5 litigating it here. I'm not sure whether Your Honor would
6 initially be interested in litigating this type of a case, a
7 complicated wrongful termination problem.

8 THE COURT: That didn't seem that very complicated to
9 me.

10 MR. SHAKED: Public policy --

11 THE COURT: It didn't seem that complicated, Mr.
12 Shaked.

13 MR. SHAKED: Again, this has been going on for nine
14 years.

15 THE COURT: Well, more or less, but they -- mostly
16 less, but it's been pending in court for nine years.

17 MR. SHAKED: Absolutely.

18 THE COURT: I mean, it's a garden variety wrongful
19 termination claim.

20 MR. SHAKED: Well, there's a lot of issues here, Your
21 Honor. All the witnesses are located in Ohio. There is
22 already counsel in Ohio for both sides. The debtor's offices
23 and officers are located in Ohio. To bring this matter back to
24 New York would be at great expense to the debtor and to the
25 claimant. They would have -- both have to hire additional

1 counsel at New York at rates significantly higher.

2 THE COURT: People appear here pro -- we have the
3 most liberal pro hac rules I think of virtually any court in
4 the country. Other than during the trial people frequently
5 appear by telephone in pretrial matters so, yes, the trial
6 would have to occur here but, I mean, that doesn't seem -- I
7 mean, we do that all the time.

8 MR. SHAKED: Well, there's a lot of documents here.
9 There's been 22,500 worth of pages of documents.

10 THE COURT: I can't imagine for a moment that 22,000
11 pages of documents are going to come into evidence as exhibits
12 in a trial in this matter whether the trial is in Ohio or the
13 trial is here. There may have been 22,000 pages that were
14 produced in discovery; whether they are all relevant to the
15 matter or not, I don't know.

16 MR. SHAKED: Well, I mean, Your Honor, this has been
17 going on for a long time. The Ohio court is familiar with this
18 matter.

19 THE COURT: Really? Is it really? I mean, what --
20 what it looked to me that there was a complaint. There was an
21 amended complaint, a motion to dis -- for judgment on pleadings
22 that was denied with a very short opinion and then there was a
23 motion to dismiss for lack of prosecution that was denied.
24 There was some squabbling about discovery but there appears to
25 have been very little court activity that's actually occurred

1 in the case in Ohio. Am I wrong? Tell me if I'm wrong.
2 Explain to me. Tell me what the significant court activity has
3 been other than the one really the motion for judgment on the
4 pleadings which was denied on the short opinion.

5 MR. SHAKED: I think there have been a few motions
6 that have been -- some procedural actions there --

7 THE COURT: Tell me about it.

8 MR. SHAKED: -- there have been a lot of depositions
9 there.

10 THE COURT: I'd like to hear about what has consumed
11 the time of the Court in the last nine years in Ohio.

12 MR. SHAKED: Well, I think the Court is familiar with
13 the company. It's familiar with --

14 THE COURT: Tell me what -- point the things in the
15 record that show -- you say the Court is familiar. Has it been
16 the same judge in the nine years that it's been on file? Do
17 they --

18 MR. SHAKED: I don't know that for a fact.

19 THE COURT: Do they have individual calendar system
20 or -- I mean, you're making a lot of generalities. I'd like
21 you to be quite specific. If you believe that there's been
22 substantial court activity in Ohio, point it out to me.

23 MR. SHAKED: I don't know the number of times they've
24 gone to court. I know there's a motion to dismiss which was
25 denied.

1 THE COURT: Well, there was a motion for judgment on
2 the pleading. It was denied in a short opinion. There was a
3 motion to dismiss for lack of prosecution which showed a very
4 lengthy period of time, but not much happening when the Judge
5 basically said -- threw up his -- appeared in the short opinion
6 to say they're both at fault about discovery. They have -- go
7 finish discovery with no merits discussion, anything. So if
8 there's been substantial court activities, substantial amount
9 of time that the Court has given to this matter, point it out
10 to me.

11 MR. SHAKED: I think that's just one of the issues
12 and in addition --

13 THE COURT: No, I -- no, no, no. But that isn't
14 answering my question. You said there's been substantial court
15 activity. I want you to give me the specifics of it. How many
16 court appearances, what issues, the same judge, different
17 judge.

18 MR. SHAKED: That I don't know, Your Honor.

19 THE COURT: Okay. So then you really don't know the
20 answer to that.

21 MR. SHAKED: I don't know the answer, the number of
22 times.

23 THE COURT: So you really can't argue that there's
24 been "substantial court activity," correct?

25 MR. SHAKED: I can argue there's been more court

1 activity in the case in Ohio than there's been in New York.

2 THE COURT: That's because this is the first time I'm
3 hearing, but --

4 MR. SHAKED: And I think the case --

5 THE COURT: I wouldn't let cases --

6 MR. SHAKED: -- whoever is presiding --

7 THE COURT: I wouldn't let cases go on for nine
8 years, but that's a different issue.

9 MR. SHAKED: I appreciate that. In addition --

10 THE COURT: So you agree it's part of -- that in
11 light of the fact that your client filed a proof of claim in
12 this court that she has submitted to the equitable jurisdiction
13 of this court and that this is part of the core jurisdiction as
14 part of the claims resolution process, correct?

15 MR. SHAKED: Initially, absolutely. Then we have the
16 right to seek to vacate stay --

17 THE COURT: You do.

18 MR. SHAKED: -- to go back to --

19 THE COURT: And that's what I'm deciding today.

20 MR. SHAKED: -- a different jurisdiction. And
21 another point, Section 157 of Title 28 emphasizes that
22 Bankruptcy Courts have no power to make factual determinations
23 regarding personal injury tort claims.

24 THE COURT: You didn't even argue that in your papers
25 here.

1 MR. SHAKED: It was mentioned in the papers.

2 THE COURT: Well, you really haven't responded to the
3 debtor's argument that this -- when the test that's applied in
4 the Second Circuit this doesn't fit in the personal injury
5 context.

6 MR. SHAKED: Well --

7 THE COURT: This is the classic wrongful discharge
8 argued as retaliatory termination. Do you have any cases from
9 Bankruptcy Courts, District Courts or the Second Circuit that
10 would say this is subject to the personal injury exception to
11 this Court's ability to try this case?

12 MR. SHAKED: I don't have any cases to --

13 THE COURT: Okay.

14 MR. SHAKED: -- clearly support that but this does
15 involve the potential personal injury as the company was
16 manufacturing defective products which would cause public harm
17 and danger to the public --

18 THE COURT: Where does -- wait a second. Come on,
19 Mr. Shaked. Do you have any cases that say that a plaintiff in
20 a wrongful termination action -- now you're arguing there could
21 be injury to third parties, that there were defective parts
22 that were sold? Are you seriously arguing that that invokes
23 the personal injury exception to this Court's jurisdiction?
24 Are you?

25 MR. SHAKED: I am not.

1 THE COURT: Okay. If you want to talk about the
2 Sonnax facts, go ahead.

3 MR. SHAKED: Looks like -- Your Honor, it looks like
4 I'm going to have to overcome a significant hurdle from what
5 I'm hearing from the Court here, with all due respect.

6 THE COURT: If you want to argue, I -- you know,
7 we -- I've gone ahead and analyzed all the Sonnax factors
8 and -- but I'd like to hear it. If you want to argue it, go
9 ahead and do it.

10 MR. SHAKED: Okay. I can go one by one. Whether --
11 the first Sonnax factors whether the relief would result in a
12 partial or complete resolution of the issues it's arguable that
13 the bulk of the discovery is now complete.

14 THE COURT: Is or is not?

15 MR. SHAKED: Is.

16 THE COURT: What about the debtor points out --
17 you've attached a lot of affidavits. None of those people have
18 been deposed, correct?

19 MR. SHAKED: They have not been deposed by the
20 debtor.

21 THE COURT: They haven't been deposed by anybody.

22 MR. SHAKED: I think they've been deposed --

23 THE COURT: Put in affidavits. They haven't been
24 deposed.

25 MR. SHAKED: Right.

1 THE COURT: Deposition is when somebody --

2 MR. SHAKED: I understand what a deposition is.

3 THE COURT: You know what a deposition is. None of
4 the people were deposed, correct?

5 MR. SHAKED: Correct. The debtor is partially if not
6 fully responsible for delaying this case. Took them seven
7 years to provide discovery documents. The state court has
8 already determined that the case has merit.

9 THE COURT: No. The state court determined -- the
10 state court denied a motion for judgment on the pleadings. You
11 say in your papers that the Court decided there was a prima
12 facie case. Denying a motion to dismiss doesn't establish as a
13 prima facie case. It's just the four corners of the pleadings
14 state a claim. It doesn't -- you know, prima facie case
15 requires evidence. There's been no evidence.

16 MR. SHAKED: You know, we think at this point both
17 parties would want to -- a quick resolution of this matter. I
18 think the Ohio state court would be the quickest resolution --

19 THE COURT: You really do?

20 MR. SHAKED: -- both parties --

21 THE COURT: When would you like to go to trial?

22 MR. SHAKED: What's that?

23 THE COURT: When would you like to go to trial?

24 MR. SHAKED: I think it'd be soon.

25 THE COURT: I'll hear from the debtors first, but I

1 give parties a very speedy trial.

2 MR. SHAKED: Okay.

3 THE COURT: Has the court -- when you say the court
4 will give the parties a very speedy trial in Ohio what is there
5 that shows that? Has there been a -- I mean, the case has been
6 stayed so there hasn't been any trial setting. What is it that
7 leads you to believe that this case would be advanced on the
8 Court's calendar? When would it be tried?

9 MR. SHAKED: I can't give a specific date. My
10 understanding is that the oldest cases get a little pressure to
11 move on and get them wrapped up. This case would probably been
12 finished for now if it wasn't for the debtor's bankruptcy
13 filing.

14 THE COURT: Why do you say that? Can you give me
15 some indication that that's true?

16 MR. SHAKED: Because at the time --

17 THE COURT: Other than the fact that the debtor's
18 motion to dismiss for the plaintiff's failure to prosecute was
19 denied, what is it that would indicate this case would be done
20 by now?

21 MR. SHAKED: At that time discovery was moving along
22 quite rapidly. We received 22 and a half thousand pages of
23 discovery from the debtor. This is stuff that the claimant has
24 been waiting for for years, for seven years. Once she has
25 that, that's something to work with and to move this thing

1 closer to trial. Without that, it was delaying this case
2 forever but once that information was received that's
3 information that the debt -- that the claimant can rely on and
4 use to push this case to trial. Again, we believe that trying
5 this case in New York would be a hardship on both parties.
6 Both the debtor and the claimant would have to spend more money
7 than they would if this case was in Ohio. Counsel in New York
8 would be significantly more expensive than counsel in Ohio.
9 Debtors -- parties and witnesses would have to travel. Not
10 everybody is going to testify over the phone.

11 THE COURT: Nobody is going to testify over the phone
12 but depositions may --

13 MR. SHAKED: Or depositions. Somebody would have to
14 appear at trial. Have to pay for lodging, travel, food.

15 THE COURT: How long a trial do you estimate?

16 MR. SHAKED: I don't do wrongful termination actions.
17 I don't know how long a trial of this magnitude would last. I
18 can't testify to that.

19 THE COURT: Go ahead.

20 MR. SHAKED: The cor -- the debtors have a corporate
21 presence in Ohio. We're dealing with Ohio laws and public
22 policy issues involving -- and the interpretation of Ohio laws
23 which someone who has been working on this for a long time
24 maybe more readily able to deal with and to interpret.

25 THE COURT: You argued in your papers that Burford

1 abstention should apply in the case. I always thought the
2 Burford abstention dealt with complex state regulatory schemes
3 whether it's natural resources, you know, railroad commissions,
4 utilities where there's a comprehensive state regulatory
5 system, none of which is true here. Yes, there's state law
6 issues, but Bankruptcy Courts deal with state law issues all
7 the time. There's no state agency that would adjudicate this
8 claim. It would be in a court of general jurisdiction in Ohio,
9 correct?

10 MR. SHAKED: Correct. It would definitely be in a
11 court of general jurisdiction.

12 THE COURT: Explain to me why you think Burford
13 abstention should apply.

14 MR. SHAKED: I think the -- Ohio is trying to
15 regulate public policy and safety of the citizens of its state
16 and the country through these statutes that they have enacted
17 regarding the manufacturing of defective products. I think
18 it's a public policy which should be applied in the broader
19 scheme as the regulation scheme. It could easily be expanded
20 to something that's going to affect a federal regulation.
21 Automobile regulations are governed not just by state but I
22 assume by also federal regulations.

23 THE COURT: So there -- what state or federal
24 regulations apply to the wrongful discharge action that this
25 plaintiff has brought?

1 MR. SHAKED: It's not the wrongful discharge. It's
2 the public policy violation of the whistleblower statute. She
3 was whistleblowing her superiors and the CEO of the company was
4 telling her, "I want you to hide documents. Don't tell anybody
5 about defective products that we have." She was protecting the
6 public by whistleblowing against this company. I think that's
7 a major event when it comes to this case.

8 THE COURT: Okay. What else?

9 MR. SHAKED: I think part of the effort here is to
10 cleanse the debtor's unwarranted past practices which we hope
11 the Court can do also as part of this process.

12 THE COURT: Is your client seeking anything other
13 than damages?

14 MR. SHAKED: Excuse me?

15 THE COURT: Is your client seeking anything other
16 than monetary damages?

17 MR. SHAKED: No. I think this Court would be better
18 utilized and better focused on the reorganization effort and
19 the Ohio court would be better utilized liquidating a specific
20 claim to make this process in New York work more efficient and
21 move faster. This may be one of the only missing links in this
22 case. I'm not that familiar with what's going on in this case.

23 THE COURT: It's not.

24 MR. SHAKED: I guess not.

25 THE COURT: Were that only the case.

1 MR. SILVERSTEIN: We dream about it.

2 MR. SHAKED: Well, we'll have to be little cog in a
3 big machine.

4 You know, I don't know what else I have to add.

5 THE COURT: Okay. Mr. Shaked, thank you.

6 Mr. Strochak?

7 MR. STROCHAK: Thank you, Your Honor. Adam Strochak
8 for the debtors. Let me start if I could with a little bit of
9 background and try to put this matter in the context of these
10 proceedings. This is a claim Your Honor characterized it as
11 garden variety, run of the mill. It would be a fair
12 characterization. It is a common law wrongful termination
13 lawsuit under Ohio common law. Ms. Ceremelli, I believe, was
14 terminated about 11 years ago and the lawsuit has been pending
15 since --

16 THE COURT: Time flies.

17 MR. STROCHAK: -- since 2000, so it's a very old
18 claim and really has absolutely nothing to do with current
19 circumstances at the company.

20 The matter, as Your Honor has indicated, was stalled
21 for a long time in the state court system and we can argue for
22 a long time about whose fault that is, but there's one issue
23 that I did want to address. Mr. Shaked suggested that part of
24 this delay was attributable to the debtor's failure to produce
25 22,000 pages of documents for seven years. That's just not

1 correct. What happened is those documents were produced. The
2 plaintiff objected --

3 THE COURT: Let me stop you because this case -- my
4 decision isn't going to -- I'm not going to decide who did or
5 didn't give discovery and when they didn't give it.

6 MR. STROCHAK: Let me jump ahead, then, Your Honor.
7 Ms. Ceremelli's claim is for over two million dollars in
8 damages and she has attached to it a two million-dollar claim
9 for punitive damages.

10 THE COURT: Well, it was 2,400,000 something with the
11 punitive damages, two million punitive damages of the amount, I
12 think, but ...

13 MR. STROCHAK: Perhaps I got that wrong, then. In
14 any event, Your Honor, the existence of a punitive damages
15 claim is one factor that suggests under Sonnax that this matter
16 is appropriate here. We would almost certainly move to
17 subordinate a punitive damages claim. That's an issue that
18 this Court would have to resolve if this matter went to trial
19 in Ohio and there ended up being a judgment for punitive
20 damages. So under the Sonnax factors complete resolution is
21 not possible in the Ohio court. That's one thing I wanted to
22 point out.

23 This is a large claim in the context of this case.
24 The reason why we objected to this claim in -- I can't recall
25 whether it was December or January of this year -- was we were

1 moving forward with the plan of reorganization process. This
2 was the largest unliquidated disputed claim that we had by a
3 long margin and we put an objection on file so that that would
4 be on file before we got into the plan process in this matter.
5 So that's how we come to be in court today. It took us six or
6 seven months to get here due to a variety of requests for
7 extension and things like that but we're able to agree on the
8 procedure to get here. That is, we deal with the lift stay
9 first.

10 I think this is a matter, Your Honor, that the
11 creditors in this case would want some visibility to being as
12 it is the largest unsecured claim in the case that is a
13 disputed unliquidated claim in the case. And having the trial
14 here is appropriate given the fact that other creditors might
15 have an interest in the resolution of this claim.

16 THE COURT: So let me ask you. Mr. Shaked said it's
17 in the plaintiff's interest and the debtor's interest to try it
18 in Ohio. I take it you don't agree as to the debtor's?

19 MR. STROCHAK: We certainly do not agree with that,
20 Your Honor. We think it's in our interests to have it resolved
21 here as part of the claims resolution process in the bankruptcy
22 both as a matter of efficiency. We're quite confident that it
23 can be resolved efficiently here. The suggestion that all the
24 witnesses are in Ohio is incorrect. Certainly a large number
25 of them would be in Ohio, but as Your Honor probably recalls

1 Mr. Delano and Mr. Lubin, the top executives for the company,
2 are both here. They want to have a role in participating
3 in this --

4 THE COURT: They have any personal knowledge --

5 MR. STROCHAK: -- trial.

6 THE COURT: Do they have any personal knowledge
7 about -- were they with the company nine years ago?

8 MR. STROCHAK: I believe they were, Your Honor, and I
9 know they have been very actively involved in defense of the
10 claim prior to bankruptcy so they would want to participate in
11 this matter and I suspect will be called as witnesses. The
12 matter is not ready for trial. Discovery -- some discovery has
13 been done. I don't know if any depositions have been taken in
14 the case but certainly a large majority of the depositions are
15 still outstanding of people --

16 THE COURT: Mr. Shaked, have any depositions been
17 taken?

18 MR. SHAKED: I'm not sure, Your Honor.

19 MR. STROCHAK: I know we have not deposed Ms.
20 Ceremelli yet and I know the affiants have not yet been
21 deposed. I don't believe it's any hardship in this case to
22 have the trial here on Ms. Ceremelli. It's a substantial
23 claim. Certainly there's some travel costs involved, but given
24 the magnitude of the damages that she's seeking having to come
25 to New York for proceedings does not appear to be an

1 insurmountable obstacle in this case. The suggestion that New
2 York counsel at higher rates would be necessary is simply
3 incorrect. Both parties could have the counsel back in Ohio
4 who are familiar with this case already participate here in a
5 trial with local counsel as necessary and as Your Honor has
6 indicated *pro hac vice* rules are quite liberal here. So we
7 don't think that trying the matter in New York is any more
8 expensive and possibly might be quite cheaper than trying it in
9 Ohio given the fact that we're confident this Court could come
10 to a speedy resolution.

11 Your Honor looked at me in connection with the
12 discussion of, you know, when we would like to see the case
13 tried. I -- let me answer that two ways. First of all, we're
14 happy to proceed. We think that there is a summary judgment
15 motion that I believe has never been decided in Ohio. We would
16 probably try and bring that and have this matter adjudicated on
17 summary judgment, although I'm fair less familiar with the
18 merits than our local counsel in Ohio so that's a decision
19 that, you know, would have to be made with some deliberation
20 obviously. So there's a possibility that we could bring it
21 forward and have some type of summary disposition. And then if
22 a trial were necessary we think we could proceed relatively
23 expeditiously here.

24 The reason I'm a little tentative about that, Your
25 Honor, is that as you will --

1 THE COURT: We have a pretty full plate coming up.

2 MR. STROCHAK: Pardon me?

3 THE COURT: You have a pretty full plate coming up
4 hopefully in the Chapter 11 itself.

5 MR. STROCHAK: There is that issue, of course. The
6 other issue is that we have tried very carefully to keep
7 control over administrative expenses in the case. So until we
8 have a little more clarity as to, you know, where this case may
9 be going in terms of the plan process I wouldn't want to steam
10 full speed ahead on the resolution of this claim.

11 THE COURT: That's why I say you have a pretty full
12 plate coming up.

13 MR. STROCHAK: Exactly. So, you know, our proposal
14 would be to -- if it's going to be heard here would be to, you
15 know, try and work out an appropriate schedule with the
16 plaintiffs that would get us to a resolution. I'm not quite
17 sure what the dates would be. We'd have to confer with local
18 counsel handling the case but, you know, hopefully having a
19 agreed-upon schedule that would move this in a deliberate but
20 not super expedited matter just because we wouldn't want to put
21 the -- incur the administrative expenses on this matter.

22 With respect to the Burford abstention argument I
23 think Your Honor is exactly correct. This is not a matter
24 that's appropriate subject to Burford type of abstention. It
25 is a run-of-the-mill common law claim. The issues associated

1 with state law is not any particularly unique whistleblower
2 statute or any particularly unique state regulatory scheme.
3 What it is is a matter where plaintiff, Ms. Ceremelli, has
4 alleged that she was -- that her termination was a violation of
5 public policy, that it was retaliatory for her conduct and that
6 retaliation violates Ohio public policy.

7 The statutory predicate for that argument, Your
8 Honor, I believe is the State unfair trade practices statute,
9 that she's asserting that the debtor's conduct violated
10 unfair -- the unfair trade practices statute in Ohio and that's
11 her hook into the public policy. That's an issue that we do
12 believe is rather unique because we don't think that argument
13 is supportable under state law, but it's not the type of
14 regulatory issue that we believe abstention is necessary.

15 THE COURT: Well, the complaint got beyond the motion
16 for judgment on the pleadings.

17 MR. STROCHAK: Pardon me?

18 THE COURT: The complaint got beyond the motion for
19 judgment on the pleadings.

20 MR. STROCHAK: That's correct, Your Honor. So on our
21 summary judgment papers we would be making the argument with
22 respect to the predicate conduct necessary to loop the public
23 policy argument then.

24 THE COURT: You know, after reading the affidavits
25 that were attached to Mr. Shaked's papers, you know, I have to

1 express skepticism whether this is a summary judgment case. Be
2 that as it may, that's not today's issue.

3 MR. STROCHAK: Yes, Your Honor. I mean, obviously
4 the allegations of those affidavits are heavily disputed.
5 There might be a summary judgment separate --

6 THE COURT: Disputed --

7 MR. STROCHAK: -- from the allegations of the
8 affidavit.

9 THE COURT: It would have to be separated from the
10 allegations in the affidavits frankly, but --

11 MR. STROCHAK: Yes. That was my point, Your Honor.
12 There might be a -- I believe that there is legal grounds. I
13 believe that the summary judgment motion the debtor has filed
14 doesn't assert that there's no disputed facts and asserts that
15 even if accepted as true the public policy rationale does not
16 survive as a matter of law.

17 THE COURT: When was the summary judgment filed in
18 state court?

19 MR. STROCHAK: I don't have the exact date, Your
20 Honor. I know it's been out there for a long time and was
21 never decided.

22 THE COURT: Was it fully briefed?

23 MR. STROCHAK: I just don't know exactly. I
24 certainly know we submitted it. I don't know if the -- if the
25 plaintiff submitted their opposition papers or not. I just

1 don't have that detail at my fingertips.

2 THE COURT: Mr. Shaked, do you know?

3 MR. SHAKED: I don't know. Your Honor, may I say one
4 thing?

5 THE COURT: Well, let -- anything else?

6 MR. STROCHAK: I'm just looking over my notes, Your
7 Honor. I think that's about it. I mean, obviously I could go
8 through each of the Sonnax factors individually if the Court
9 would welcome more argument but I think I've said what I need
10 to say in response to Mr. Shaked.

11 THE COURT: All right. Mr. Silverstein, do you want
12 to be heard?

13 MR. SILVERSTEIN: No, Your Honor. I mean, there were
14 colorful pleadings that obviously needs to be resolved, but I
15 don't have anything from this.

16 THE COURT: Okay. All right. Mr. Shaked?

17 MR. SHAKED: Just very briefly. This court has a
18 full plate of Lexington Precision. If this claim dispute is
19 moved to Ohio we can go in two directions at the same time and
20 move it a lot faster.

21 THE COURT: Mr. Shaked, you misunderstood what I was
22 saying. I don't have a full plate of Lexington Precision. I
23 think Lexington has a lot of issues that it has to focus its
24 attention on to try and see whether it can propose a plan and
25 successfully get through the plan process.

1 During that period of time in the Court's view it
2 would be inappropriate to divert management attention to
3 simultaneously having to prepare and defend an action in state
4 court in Ohio. As far as this Court's time is concerned, I can
5 try this case as soon as the parties would be ready. The issue
6 is not that. The issue is whether this debtor at this time
7 during the life of this Chapter 11 case should be devoting its
8 attention to trying to reach an agreement with the Creditors'
9 Committee with its prepetition lenders to getting a plan --
10 disclosure statement and plan proposed and not be diverted by a
11 state court action. So it really isn't an issue of whether
12 this Court has too much on its plate.

13 All right. With respect to the motion before me
14 today which is to lift the automatic stay and permit this
15 action to return to state court in Ohio the motion is denied.
16 In reaching its decision the Court has considered the so called
17 Sonnax factors which arise from In Re: Sonnax Industries, 907
18 F.2d 1280 at page 1286 (2d. Cir. 1990). In Sonnax, the Second
19 Circuit identified a list of nonexclusive factors the Court
20 should consider in deciding whether to lift the stay, commit an
21 action to return to a state court. Not all of the factors are
22 necessarily relevant in each case and not all of them have to
23 weigh one way or the other.

24 The first factor is whether the relief requested
25 would result in a partial or complete resolution of the issues.

1 On this issue I view it as fairly closely balanced. I think
2 that whatever the results in Ohio it would not fully resolve
3 all of the issues that would have to be dealt with so the
4 matter would still have to come back to this court if for no
5 other reason than the issue of subordination of any punitive
6 damage claim if punitive damages were awarded.

7 While each side blames the other, it's clear that
8 this case has languished for nine years or so in the state
9 court in Ohio with what appears to this Court at least very
10 little activity within the state court. The moving papers and
11 responding papers here address two specific matters handled by
12 that court, namely the motion for judgment on the pleadings
13 which was denied which really does nothing more than decide
14 that the complaint stated a claim. Contrary to the plaintiff's
15 argument it does not establish that there's a *prima facie*
16 showing of an entitlement to relief. There does appear to be
17 substantial amount of discovery that remains to be done. The
18 plaintiff has submitted a large number of affidavits. None of
19 those people have been deposed. Plaintiff herself has not been
20 deposed.

21 Second Sonnax factor is the lack of any connection
22 with or interference with the bankruptcy case. The debtor
23 argues and the Court agrees that lifting the stay would
24 distract the debtor's management, which is a relatively small
25 group from the most serious issues on its plate today which is

1 trying to move this bankruptcy case forward, so at this time
2 certainly it would be inappropriate for the Court to lift the
3 stay.

4 The third Sonnax factor is whether the other
5 proceeding involves the debtor as a fiduciary no one argues
6 that it does so that factor is not relevant.

7 Fourth factor is whether specialized tribunal with
8 necessary expertise has been established to hear the cause of
9 action and the answer to that is clearly no. This is within
10 the court's general jurisdiction in Ohio and it's -- because
11 the proof of claim was filed here it's within this Court's core
12 jurisdiction and it's part of the claims resolution of process.
13 Burford abstention clearly does not apply in a case such as
14 this. That's basically a common law claim that may involve
15 Ohio law but this court regularly deals with the law of many
16 states in deciding matters before it. So this factor clearly
17 weighs against lifting the stay.

18 Fifth factor is whether the debtor's insurer has
19 assumed full responsibility for defending the case. In here,
20 no one contends that there is insurance so that factor weighs
21 against lifting the stay.

22 Sixth factor is whether the action primarily involves
23 third parties. Again, this factor weighs against lifting the
24 stay. This is an action against the debtors.

25 Seventh, whether the litigation in another forum

1 would prejudice the interests of other creditors. The debtor
2 here argues it would prejudice other creditors because it would
3 focus the debtors away from managing the stay. The Ceremelli's
4 argument is it would not prejudice other creditors because
5 litigating it here will require parties to duplicate their
6 efforts in state court wasting valuable resources. I don't see
7 any duplication. As best this court can tell there's been
8 22,500 pages of documents produced. Whether used here or used
9 in Ohio makes no difference whatsoever so the Court believes
10 that this factor weighs against lifting the stay.

11 Eight is whether the judgment claim arising from the
12 other action was subject to equitable subordination to the
13 extent that it includes a punitive damage claim which it does.
14 That would be subject to equitable subordination. Again, the
15 factor weighs against lifting the stay.

16 And the ninth factor is whether the movant's success
17 in the other proceeding would result in a judicial lien
18 avoidable by the debtor. There would be no lien. I could go
19 through the rest of the factors but while some of them I think
20 are closer calls than others on balance the Court concludes in
21 the exercise of discretion it would be inappropriate here to
22 lift the stay and send this case back to the Ohio court.

23 Now, with respect to how we proceed in the first
24 instance counsel for the respective parties need to discuss a
25 plan on how this is to proceed. In reading the papers I see

1 that the parties bifurcated the issue of whether to lift the
2 stay from the claims objection itself. The claims objection,
3 which I did review, really at least on its face sort of misses
4 the mark in light of the fact that the state court in Ohio -- I
5 mean, the objection really argues that the plaintiff has failed
6 to state a claim. Well, the court in Ohio essentially decided
7 that quite some time ago when it denied the motion for judgment
8 on the pleadings. I have no idea what's in the summary
9 judgment motion but from the papers I read this would clearly
10 seem to be -- is a contested matter under 9014 and I'm
11 skeptical about whether summary judgment is going to be
12 possible or whether that's going to be the most fruitful avenue
13 for resolving the matter.

14 On the other hand, at the present time the debtor's
15 attention is it's much more important to be focused on trying
16 to come up with a plan of reorganization, disclosure statement
17 and plan in moving this process going. I've seen the debtors
18 filed a new motion for use of cash collateral. It appears that
19 that -- I'll ask you about what the status of that is before we
20 end. Don't need to respond now. So there are issues that
21 surely should command the debtor's attention immediately. So,
22 Mr. Shaked, whether it's you or counsel in Ohio should confer
23 with Mr. Storchak and his colleagues about how to proceed with
24 respect to the claim and the objection to the claim. There's a
25 contested matter. Discovery rules generally apply to it, but

1 let's see where we get to, but for purposes of today's hearing,
2 the motion to lift the stay is denied.

3 You're welcome to stay or not, Mr. Shaked, but we've
4 got fee applications to deal with. That's why I took this
5 before we got to the fee app.

6 MR. SHAKED: All right. Thank you, Your Honor.

7 THE COURT: Thank you very much. I appreciate it.

8 Okay. Mr. Strochak.

9 MR. STROCHAK: Thank you, Your Honor. Would it make
10 sense to address some of your questions about status --

11 THE COURT: Yeah. Why --

12 MR. STROCHAK: -- before the fee objections?

13 THE COURT: -- don't you do that?

14 MR. STROCHAK: The fee applications. I believe we've
15 not yet filed the motion to extend use of cash collateral. I
16 believe we've called chambers and asked -- inquired about
17 hearing dates.

18 THE COURT: All right.

19 MR. STROCHAK: And I don't think it's on file yet.
20 It will be coming very shortly.

21 THE COURT: All right.

22 MR. STROCHAK: You know, we're going to be discussing
23 whether the lenders will agree to a consensual extension. I
24 don't know that we will be in any different place than we were
25 the last time around with the lenders but we will be having --

1 THE COURT: GM and Chrysler --

2 MR. STROCHAK: -- discussions.

3 THE COURT: The new GM and new Chrysler and --

4 MR. STROCHAK: We're still --

5 THE COURT: And about an hour ago --

6 MR. STROCHAK: -- the old Lexington.

7 THE COURT: -- Judge Drain approved the modified plan
8 of Delphi to exit bankruptcy so, you know, that's progress in
9 the auto industry at least, maybe not with Lexington.

10 MR. STROCHAK: Yeah. No, I appreciate that, Your
11 Honor. We've been providing regular updates on the mediation
12 status and where things are right now from the debtor's
13 perspective in terms of moving the case forward is, you know,
14 it's very clear to everyone that we need some type of financing
15 to get this company out of Chapter 11 in a reorganized fashion.
16 The debtors are exploring with a number of investors. They've
17 had, you know, an active marketing program to attract -- call a
18 plan investor or some type of exit capital for the business.
19 They are -- have had meetings and discussions with about a
20 dozen potential investors over the last several weeks and that
21 process is moving forward. The mediation is still continuing.
22 Mister --

23 THE COURT: The updates on the mediation really
24 haven't changed at all in the last several -- I don't know
25 whether anything in the mediation has changed, but the reports

1 seem essentially the same to me; no progress.

2 MR. STROCHAK: No. That's correct, Your Honor.

3 There's been no -- certainly no concrete progress. There are
4 discussions going on. Mr. Preston is still involved. I know
5 he met with the debtors this week. I believe he met with
6 members of the committee this week, at least that's what I was
7 told. We are, you know, trying to move forward in a way where
8 the Committee, my understanding, is also out seeking
9 investments of its own to try and come up with a plan. We are
10 trying to move forward in a way that will allow a plan investor
11 to come in that will allow payment of -- to the bondholders of
12 the value that they ascribe to the debtors and it will bring in
13 sufficient capital to bridge the gap between what's available
14 in the market and what the debtors need in order to -- in order
15 to finance a plan of reorganization going forward.

16 So that is as best a summary the current status as I
17 can give Your Honor. You know, we certainly wish as a business
18 matter that there was a way to conclude this faster. The
19 debtors are actively trying to make it happen but it is a very
20 difficult business problem for them at this point to achieve.

21 THE COURT: What happened with the transition of
22 the -- was it the seal business -- what was -- what's happening
23 with that?

24 MR. STROCHAK: The consolidation and transition of
25 the connector seals business is done. Those operations were

1 consolidated into the other plants and moved and that is
2 fundamentally complete at this point if not totally complete,
3 but my understanding is there's nothing really outstanding on
4 that. The Ohio facility has been shut down and that part of it
5 is done.

6 THE COURT: And what's the performance of the medical
7 parts business?

8 MR. STROCHAK: I don't have the exact numbers for
9 medical. I don't have that breakdown with me, Your Honor. I
10 know the business over the last -- well, certainly the May
11 numbers were not very good and that is because the debtors made
12 a determination to essentially reduce their inventory
13 substantially so that had a fairly significant effect on the
14 May numbers. So EBITDA for the entire company in May, I
15 believe, was just a hair over break even if I remember that
16 correctly from the monthly operating report.

17 I believe June was better. Still not fantastic but
18 better. The company's cash position is very good. They
19 have -- actually wrote down the exact numbers on that. The
20 cash position -- the cash budget for the week ending last
21 Friday was about 2.7 million dollars. The actual cash was just
22 a hair over four million dollars so they're about 1.2 million
23 over the cash forecast for that period so the cash is holding
24 up well. They've been very successful in managing costs.

25 I think the administrative expenses for the case now

1 Your Honor has the fee applications for December through March
2 which really don't reflect this yet because that was a period
3 of very high activity but really since March the administrative
4 expenses have been significantly reduced in terms of the
5 Chapter 11 case and it's one area that Mr. Silverstein and I
6 agree on. We've both been as visual as we can be in minimizing
7 the activity in the case and I think the fee applications in
8 the next period will be substantially less in this thing.

9 THE COURT: Mr. Silverstein, do you want to be heard?

10 MR. SILVERSTEIN: Yes, if I may very, very briefly.
11 Yes, administrative expenses currently are very low, as far as
12 I understand them. I'm doing virtually nothing on this case at
13 this point except for a few conversations with the Committee.

14 The cash position is good because the debtor sold a
15 lot of inventory so they converted it into cash, therefore so
16 there's -- you know, it's better than not having --

17 THE COURT: Better to have the cash than the
18 inventory.

19 MR. SILVERSTEIN: Exactly. So it's better than not
20 having cash, but fundamentally nothing has really changed and
21 there is still the basic impasse. I mean, we're at the
22 interesting stage of the debtors not being able to confirm a
23 plan and at this moment the Committee not being able to confirm
24 a plan because we're missing a certain chunk of exit capital,
25 exit financing with which to do that. We need to obviously

1 reach an agreement with the capital source and I expect the
2 next milestone for Your Honor will be the next cash collateral.
3 I don't think I have anything to add.

4 THE COURT: Okay. Thank you. All right. Let's move
5 to the fee apps.

6 MR. STROCHAK: Is there any particular way you'd like
7 to address these, Your Honor?

8 THE COURT: No, you can go through them.

9 MR. STROCHAK: I think what might make sense is to
10 start with the objections.

11 THE COURT: Okay.

12 MR. STROCHAK: So --

13 THE COURT: Is it -- no one is here from the U.S.
14 Trustee's Office?

15 MS. GASPARINI: Yes.

16 THE COURT: Are you -- I'm sorry.

17 MS. GASPARINI: Your Honor, good afternoon.
18 Elisabetta Gasparini from the United States Trustee's Office.

19 THE COURT: I don't think you've been before me
20 before. Welcome.

21 MS. GASPARINI: Pardon me?

22 THE COURT: Have you been -- I don't think you've
23 been before me.

24 MS. GASPARINI: No, Your Honor. I'm one of the new
25 trial attorneys here so I've been with the office for about two

1 months now.

2 THE COURT: Nice to have you here.

3 MS. GASPARINI: Thank you.

4 THE COURT: Thank you. I apologize for not
5 recognizing you --

6 MS. GASPARINI: No problem.

7 THE COURT: -- but now I know most of the others.

8 MS. GASPARINI: I have not appeared in front of you.

9 THE COURT: Thank you, Ms. Gasparini.

10 THE COURT: All right. So -- well, let's just go
11 through them one by one. Okay. So the first one in the binder
12 is the Andrews Kurth.

13 MR. SILVERSTEIN: Yes. I guess I'll take that, Your
14 Honor.

15 THE COURT: Go ahead, Mr. Silverstein.

16 MR. SILVERSTEIN: Thank you. There were two
17 objections: one by the U.S. Trustee and one from the debtor.
18 I'd like to take them one by one.

19 THE COURT: Okay.

20 MR. SILVERSTEIN: As far as the U.S. Trustee
21 objection aside from hold-back issues which applies to
22 everyone --

23 THE COURT: Right.

24 MR. SILVERSTEIN: -- there was some dispute items
25 that the U.S. Trustee had issues with or questions and we

1 basically said, you know, full unconditional surrender. I
2 think there's \$1269.00 in time entries where there were
3 internal inconsistencies. They didn't have --

4 THE COURT: Right. \$3,586.33 is --

5 MR. SILVERSTEIN: Expenses. Correct. I think
6 \$105.00 of Lexus charges. So we're -- that will be deleted
7 from the --

8 THE COURT: Okay.

9 MR. STROCHAK: -- application of the order. The
10 issue with the debtor relates to approximately \$90,000.00 of
11 expense incurred by the Committee in connection with the
12 Committee's retention of a testifying expert by the name of
13 Pluris Valuation Advisors. The Committee retained Pluris in
14 December of 2008 to testify with respect to the fair market
15 value of the C receiver preferred stock and the common stock,
16 which the debtor has proposed to issue pursuant to their plan.
17 At that time I think Your Honor will recall we were hot and
18 heavy, so to speak, going towards a contested confirmation
19 hearing.

20 We had dates set for that hearing. We retained
21 Pluris basically because in a valuation there were really
22 two -- there are two aspects to valuation. So hypothetically
23 if a determination is made by the Committee's financial advisor
24 SRR that total enterprise value is, for example, hypothetically
25 a million dollars and there are a million shares being issued,

1 it does not necessarily follow that each share is worth a
2 dollar.

3 Similarly, because you don't just divide it by the
4 number of shares because there are unique things to certain
5 shares. Here there was sort of a complex preferred share,
6 preferred stock being issued. There was common stock being
7 issued with a fairly large insider ownership and we felt it was
8 necessary and appropriate to take it to the second step because
9 once Your Honor made a determination on enterprise value you
10 then have you say, okay, well, what is -- what are you getting
11 under the plan and what is that consideration worth.

12 THE COURT: And why is it that Stout Risius Ross
13 which had been retained pursuant to order of the Court and its
14 engagement would seem to have covered the issues --

15 MR. SILVERSTEIN: The --

16 THE COURT: -- why is it that they weren't doing the
17 work and you have a nonretained -- when I say "nonretained,"
18 nonapproved expert which you've described as a trial --

19 MR. SILVERSTEIN: Right.

20 THE COURT: -- expert?

21 MR. SILVERSTEIN: Well, I'll address --

22 THE COURT: Go ahead.

23 MR. SILVERSTEIN: -- the legal issue and the factual
24 issues. SRR's focus and what they do for a living is they're
25 business valuation experts. They're business -- they're

1 bankers in the auto industry. You know, similar -- I'll get in
2 trouble for saying this, but similar to W.Y. Campbell in some
3 respects. They bought bankers and financial advisors as to the
4 value of auto and related businesses. Their true expertise is
5 not valuing the securities that are being issued under the plan
6 and it was our judgment that in this contested valuation fight
7 we needed that expertise.

8 Mr. Brock principally worked with Pluris. Pluris
9 prepared an expert report. Pluris was prepared for a trial. I
10 think the law is very clear that a testifying expert who is not
11 directly involved in the administration of the case doesn't
12 need to be retained by court order.

13 THE COURT: I -- you said that but didn't cite any
14 authority.

15 MR. SILVERSTEIN: I'll give you a coup --

16 THE COURT: But while Weil Gotshal said --
17 disagreed -- I haven't had the issue before. Actually asked a
18 couple of my colleagues and they didn't think it was so clear.

19 MR. SILVERSTEIN: Well, Weil Gotshal does it all the
20 time. You know --

21 THE COURT: Well, that doesn't mean that it's --

22 MR. SILVERSTEIN: I know, but the case -- if you want
23 the cases I can cite a few cases to you. I don't have --

24 THE COURT: Let me ask you to -- let me tell you now.
25 You've gave me about as much information for \$91,000.00 as I

1 would get for \$100.00 dinner.

2 MR. SILVERSTEIN: That's a fair comment.

3 THE COURT: Where there was a \$20.00 per person
4 limit. So how -- you know, why you think you're going to get
5 approval for \$91,000.00 disbursement when I drive people crazy
6 about documenting a dinner for five people.

7 MR. SILVERSTEIN: Your Honor, I was given the binder
8 last night and one of my comments after looking at the binder
9 this morning was do we have a little more documentation on the
10 \$91,000.00. I mean, I understand --

11 THE COURT: Well, they didn't even tell -- you know,
12 their invoice says -- breaks it down by the analyst and so a
13 dollar figure hourly rate. Doesn't say what the hourly rate
14 is, doesn't say --

15 MR. SILVERSTEIN: Yeah.

16 THE COURT: -- how many hours people work, what they
17 do, whatever. It just --

18 MR. STROCHAK: I can't argue with Your Honor's
19 comment because I have the same comment. I'm sure it's well
20 justified. But if we wanted to defer that and bring it back,
21 we can certainly have Your Honor review their report in camera.
22 We can have more detail and Mr. Brock obviously has to tell me
23 specifically what they did because he was doing it with them.
24 I wasn't. And we can provide that detail.

25 I appreciate that comment. I don't have a good

1 answer for that and I understand, so -- I fully understand.
2 But in terms of the predicates if I can orally tell you the
3 cases --

4 THE COURT: Well, here's what I'd like you to do
5 because I -- with respect to the \$91,226.68 I'm denying it
6 without prejudice.

7 MR. SILVERSTEIN: Yeah. I --

8 THE COURT: Okay.

9 MR. SILVERSTEIN: I understand.

10 THE COURT: So I'm not saying you're eating that
11 cost.

12 MR. SILVERSTEIN: Right.

13 THE COURT: But, you know, I also thought -- you'll
14 excuse me -- is was a little cute when you paid them a
15 \$25,000.00 retainer which you listed in your -- expense word is
16 "miscellaneous items."

17 MR. SILVERSTEIN: That -- but --

18 THE COURT: And when you got it --

19 MR. SILVERSTEIN: You've been in a law firm -- law
20 firms before, Your Honor. You know that when you put in an
21 expense --

22 THE COURT: Yeah, but when you need to get court
23 approval for anything you're doing and you don't do it --

24 MR. SILVERSTEIN: I -- that I understand and when --

25 THE COURT: And so -- and only the debtor -- one of

1 Mr. Strochak's partners sent an email about what it was about
2 and we got a fairly cryptic email response.

3 MR. SILVERSTEIN: And you got a more detailed email
4 after that, but at that point if you remember, Your Honor, the
5 dynamic was that we --

6 THE COURT: I understand.

7 MR. SILVERSTEIN: -- were not getting along
8 particularly well.

9 THE COURT: So here's what I'm going to suggest is I
10 would like -- I'm going to give you -- if Mr. Strochak wishes,
11 I'd like to see some authority for, you know, trial expert. He
12 doesn't have to be retained.

13 MR. SILVERSTEIN: Letter brief okay?

14 THE COURT: Yeah, letter brief. And Mr. Strochak --
15 give him a chance to respond.

16 MR. SILVERSTEIN: Sure.

17 THE COURT: I'm -- you know, I'm assuming -- I
18 haven't read the cases on it but I'm assuming you're right on
19 that point, okay?

20 MR. SILVERSTEIN: I think I'm absolutely right on
21 that.

22 THE COURT: Okay. I'm not -- I just want to see the
23 authority on it.

24 MR. SILVERSTEIN: Sure.

25 THE COURT: Okay.

1 MR. SILVERSTEIN: And --

2 THE COURT: And we'll give the debtor a chance to
3 respond, but I'm not approving -- even we get over that hump --

4 MR. SILVERSTEIN: How do you want to deal with --

5 THE COURT: -- I'm not approving \$91,000.00 based on
6 what you've put in here.

7 MR. SILVERSTEIN: I appreciate that. How does Your
8 Honor want to deal with that?

9 THE COURT: Well --

10 MR. SILVERSTEIN: Do you want an affidavit, do you
11 want --

12 THE COURT: Let me add for -- you know, the first
13 line of defense on all of this is Ms. Gasparini and the U.S.
14 Trustee's Office because I think they do -- I was surprised we
15 didn't get an objection from you with respect to this huge
16 \$91,000.00 item. I mean, you'll excuse me but you nitpick
17 about -- justifiably you nitpick about a dinner that's over
18 \$20.00 or too much in copying and all that, and here was a
19 \$91,000.00 item that wasn't included in your objection. So I
20 want the U.S. Trustee to see --

21 MR. SILVERSTEIN: That's fine.

22 THE COURT: -- whatever it wants. Now let's talk
23 about -- I'm not all that anxious -- I understand you don't
24 want to share a copy of the report with --

25 MR. SILVERSTEIN: Yeah, I'd prefer not.

1 THE COURT: Okay. And I'm not all that anxious to
2 read something that they're not reading.

3 MR. SILVERSTEIN: Fair enough.

4 THE COURT: So let me hear from Mr. Strochak on this
5 point.

6 MR. SILVERSTEIN: Okay. And the point --

7 THE COURT: The table gets turned often and, you
8 know, whether they're -- what happens to you may happen to them
9 at a later point, so --

10 MR. SILVERSTEIN: Right. But before you get to Mr.
11 Strochak --

12 THE COURT: Yes.

13 MR. SILVERSTEIN: -- obviously any documentation or
14 any further embellishment as to what they did to show why we
15 spent \$91,000.00 and why it was reasonable we will do. We'll
16 start --

17 THE COURT: They must keep time records, right?

18 MR. SILVERSTEIN: I think they do keep time records.
19 What I saw from the documentation was not the kind of time
20 records that we are used to seeing from legal professionals,
21 for example. And I appreciate --

22 THE COURT: Not only legal professionals, but I mean,
23 you know, with financial advisors you may not require in the
24 report [unintelligible] if they are retained, but --

25 MR. SILVERSTEIN: Yes.

1 THE COURT: -- but you still require --

2 MR. SILVERSTEIN: Yeah. I understand what Your Honor
3 needs --

4 THE COURT: Okay.

5 MR. SILVERSTEIN: -- because that was my only
6 reaction. I wanted more detail on what the \$91,000.00
7 consisted of. I know that Mr. Brock was supervising that, so I
8 have full confidence that it will end up being satisfactory to
9 Your Honor and to the U.S. Trustee and to the debtors but on
10 the legal issue we'll submit a short letter brief on that.

11 THE COURT: Okay. So --

12 MR. SILVERSTEIN: Unless the Court rules --

13 THE COURT: Here's what I would like you to do.
14 First you need to consult with Weil and see if you can agree
15 not only on what you're going to give me, but what you're going
16 to give them to look at. I understand you don't want to give
17 them the reports, but they're entitled to see more than you've
18 given anybody at this point.

19 MR. SILVERSTEIN: Fair enough.

20 THE COURT: So far. And if you can't agree, we'll
21 have a phone calls and we'll see what we --

22 MR. SILVERSTEIN: I'm sure we can agree.

23 THE COURT: -- have. Okay.

24 MR. SILVERSTEIN: And I'm sure that additional
25 documentation --

1 THE COURT: Because this could turn around later. I
2 mean, in --

3 MR. SILVERSTEIN: They've got their testifying
4 expert.

5 THE COURT: -- you all have the same issue.

6 MR. SILVERSTEIN: Hopefully we won't need testifying
7 experts but you never know.

8 THE COURT: I'm really not interested in seeing the
9 report because I don't want to see it on an *ex parte* basis --

10 MR. SILVERSTEIN: Yeah, and I appreciate that.

11 THE COURT: -- the report that goes to the merits of
12 all this.

13 MR. SILVERSTEIN: But I am saying there is a report,
14 there was work and, yes, I understand that Your Honor
15 reasonably wants to see --

16 THE COURT: Okay.

17 MR. SILVERSTEIN: -- more documentation, so I suspect
18 we can essentially defer this to I guess the next interim fee
19 application if not sooner.

20 THE COURT: It doesn't even -- you know --

21 MR. SILVERSTEIN: I don't know when that will be. I
22 know that the next fee appli --

23 THE COURT: You don't have to wait all -- if you want
24 to move it it's a lot of money.

25 MR. SILVERSTEIN: It's time material.

1 THE COURT: So if you want to advance it --

2 MR. SILVERSTEIN: Okay.

3 THE COURT: -- sooner I'm open to doing that.

4 MR. SILVERSTEIN: That's fine.

5 THE COURT: Okay.

6 MR. SILVERSTEIN: Thank you, Your Honor.

7 THE COURT: All right.

8 MR. SILVERSTEIN: I don't know if Your Honor has any
9 questions. You may have some. The U.S. Trustee and we and the
10 debtors may have missed something else. You usually pick up
11 things.

12 THE COURT: You know, yes. [Unintelligible] question
13 terrific on this. They --

14 MR. SILVERSTEIN: In 1982 I used to do that. It was
15 just the worst part of my job when I was in this district as a
16 law clerk.

17 THE COURT: But, you know, what I -- because I never
18 know what the U.S. Trustee has dinged you on so I don't like to
19 double dip.

20 MR. SILVERSTEIN: They did okay. They dinged a
21 little bit. I mean, it was \$5,000.00 I think on a not so --

22 THE COURT: Let me -- there was a category that --
23 and I'm not -- I'm going to abide by what the U.S. Trustee did,
24 but I want to identify an issue that's binding.

25 MR. SILVERSTEIN: Sure.

1 THE COURT: And that's copying charges.

2 MR. SILVERSTEIN: That's what?

3 THE COURT: Copying charges.

4 MR. SILVERSTEIN: Copying charges?

5 THE COURT: Yeah. Your page -- you know --

6 MR. SILVERSTEIN: What are we charging? I didn't
7 even notice that. There's a stack --

8 THE COURT: You copied 10,000 pages.

9 MR. SILVERSTEIN: I assume that had to do with trial
10 preparation and the like. I mean, and I would bet my bottom
11 dollar that that was probably done in connection with Mr.
12 Brock's work preparing for trial. That's --

13 THE COURT: Okay. But, you know, don't kill the
14 forest. You just --

15 MR. SILVERSTEIN: We'll get a scribe next time.

16 THE COURT: No. I'm serious. I mean, because the --
17 look, I was in the firm for many years. I know you turn
18 associates loose and they think it's easy to make five copies
19 of everything and --

20 MR. SILVERSTEIN: Again, I --

21 THE COURT: -- four of them wind up getting thrown
22 away and only one gets looked at.

23 MR. SILVERSTEIN: Because mine will likely get thrown
24 away as well.

25 THE COURT: It's just -- I'm not --

1 MR. SILVERSTEIN: Well, I will look into photocopies.

2 THE COURT: The dollars aren't that great here, but
3 we look at it and say, why were 10,000 pages copied.

4 MR. SILVERSTEIN: But I have a very strong feeling
5 that 10,000 copies weren't copied because we were inherently
6 wasteful and silly. I'm sure there was a legitimate reasons
7 why 10,000 copies were made. I can inquire and I'm sure we
8 have the dates on which they were made so we can track it down.
9 I can provide the U.S. Trustee an explanation. I'm sure Your
10 Honor does not want to hear it, but I get the point, Your
11 Honor. Save trees.

12 THE COURT: They didn't give you the dates when they
13 made the copies --

14 MR. SILVERSTEIN: I can find --

15 THE COURT: -- but you can do that, too.

16 MR. SILVERSTEIN: I can do that. I don't need Your
17 Honor to do that.

18 THE COURT: Okay.

19 MR. SILVERSTEIN: Any other things that are bothering
20 the Court?

21 THE COURT: No. So we have to deal with the hold-
22 back.

23 MR. SILVERSTEIN: Yeah. We've -- I think --

24 THE COURT: You have an agreement on the hold-back
25 issue or --

1 MR. SILVERSTEIN: I think Mr. Strochak can address
2 all -- I think we would prefer ten percent, the U.S. Trustee
3 indicates 20 percent. I think that Mr. Strochak will probably
4 argue this to both.

5 THE COURT: Let me hear from Ms. Gasparini on this
6 issue of the hold-back.

7 MS. GASPARINI: Good afternoon, Your Honor.
8 Elisabetta Gasparini. I won't go over again the reductions
9 that we agreed to, but we did have some informal inquiries for
10 three of the professionals, specifically Weil Gotshal, W.Y.
11 Campbell, and Andrews Kurth, and we reached agreements. We
12 appreciate, Your Honor, your comments regarding the expert. I
13 did review the invoices and the agreement that was attached to
14 the application but we certainly look forward to seeing more in
15 support of that.

16 Having said that we still have an objection regarding
17 the hold-back. As Your Honor has also heard about the status
18 of the case that doesn't seem to have been much progress in the
19 past few months and the mediation is still where it stands; the
20 parties have not reached an agreement. Therefore, we think
21 that given the status of the case we request that a 20 percent
22 hold-back is the appropriate figure at this time and we request
23 that there be a 20 percent hold-back in fees until the end of
24 the case.

25 THE COURT: Thank you.

1 MS. GASPARINI: Thank you.

2 MR. SILVERSTEIN: Before Mr. Strochak just trying
3 to --

4 THE COURT: Go ahead.

5 MR. SILVERSTEIN: You know, historically hold-backs
6 in my experience have been really used to sort of push the
7 lawyers along. The --

8 THE COURT: I was thinking about a 50 percent hold-
9 back. I think you all need a big push.

10 MR. SILVERSTEIN: Well, but the problem is -- my
11 point, though, is that the lawyers don't need the pushing.
12 Okay. It's not the lawyers here that are causing the
13 stalemate. And so, you know --

14 THE COURT: But they're ones who get blamed for it,
15 though.

16 MR. SILVERSTEIN: Oh, we get blamed for everything.

17 THE COURT: You're the ones who --

18 MR. SILVERSTEIN: But we expect Your Honor to
19 understand, you know, a little bit more about whether we're the
20 problem or whether we're just sort of in the middle. And I
21 don't think that at this point the lawyers are the problem.

22 THE COURT: Why do you say that?

23 MR. SILVERSTEIN: Because it's true and because it's
24 really a business problem. Remember, this is the case where
25 the debtor's management still says they're not fiduciaries

1 because they're solvent and I need not say any more. It's not
2 the lawyers.

3 THE COURT: Mr. Strochak.

4 MR. STROCHAK: I think maybe Mr. Silverstein and I
5 are close to the same page on this. The fundamental problem
6 with this case seems to be a business one is that a business
7 resolution to the problem of financing, the exit hasn't emerged
8 yet and, you know, respectfully despite our efforts to move the
9 case forward in any direction that we could toward what in the
10 debtor's view is the best resolution for all interested parties
11 it hasn't been able to happen for business purposes. You know,
12 we have a dispute between the parties in terms of, you know,
13 valuation and if we need to we'll have a trial on valuation
14 someday but I would agree with Mr. Silverstein that this is not
15 a case where antagonism between counsel has delayed the
16 business resolution that's necessary to get the company out of
17 Chapter 11. You know, for a long time Mr. Silverstein --

18 THE COURT: For a long time every issue in the case
19 was litigating every extension of time, but --

20 MR. SILVERSTEIN: There was a reason.

21 THE COURT: Maybe from your vantage point.

22 MR. STROCHAK: I agree, Your Honor. I mean, there
23 certainly are -- you can point to things that happened in this
24 case where administrative expenses might have been lower if
25 counsel had taken different positions on issues. I'm not

1 trying --

2 THE COURT: Let me ask you --

3 MR. STROCHAK: -- to cast the blame here.

4 THE COURT: If -- this is a serious concern. If your
5 motion for use of cash collateral is denied what happens in
6 this case?

7 MR. STROCHAK: Well, you know, the obvious answer to
8 that in the abstract, Your Honor, is that the debtors can't
9 operate without cash collateral so the case would have to be
10 converted.

11 THE COURT: Okay. And if the case were converted to
12 7 what happens to the Committee counsel fees and the debtor's
13 counsel fees? They drop down and Chapter 7 Trustee and Chapter
14 7 Trustee counsel, you know, those administrative claims get a
15 higher priority. I wrote an opinion in a case In Re: King,
16 case that converted from 11 to 7, and there's substantial
17 authority about -- first off, the former Chapter 11 counsel
18 faced a risk of disgorgement and there's a lot of authority
19 about deferring their fees to the end of the case if there are
20 other fees at that point.

21 So it's -- you know, I don't have a cash collateral
22 motion. I mean, we've been through one contested cash
23 collateral already. It would be a very unfortunate end for
24 this case if that's what transpired but it's not beyond the
25 realm. Okay. And so I'm -- you know, I'm uncomfortable

1 about -- and this is without fault to any of you, okay. I'm
2 uncomfortable about given the -- you know, yes, there's cash in
3 the estate. I understand you say it's above budget. Not a lot
4 of cash. Right. Until the direction of this case becomes
5 clearer I'm really uncomfortable about not having a lar -- you
6 know, fairly substantial hold-back. I'm actually surprised
7 that the U.S. Trustee only asked for a 20 percent hold-back at
8 this stage and that's -- you know, that could change if you get
9 beyond the next -- you know, you have consensual cash
10 collateral order again and we get beyond that. But I'm really
11 worried about it.

12 MR. STROCHAK: We certainly share Your Honor's
13 concerns about, you know, the direction the case is going. In
14 terms of value it's always been the debtor's view and it
15 continues to be the debtor's view that there's ample value in
16 the estate, particularly with respect to the senior secured
17 debt to the bank lenders. There is ample value to satisfy
18 their claims and in terms of -- you know, if we ever had to had
19 a -- you know, in this horrible worst case scenario where the
20 case ever converted there would be ample value to satisfy the
21 senior secureds through, you know, some type of sale process in
22 the business. Then you'd have Chapter 7 administrative
23 expenses which would come before the Chapter 11 administrative
24 expenses, but we're still of the view that there's ample value
25 there to cover whatever it would take to administer even a

1 Chapter 7 case and that that would not be a substantial
2 problem. Now, the recovery for unsecured creditors would be
3 what really got hurt in that situation.

4 So that's our view with respect to the hold-back.
5 We're certainly, you know, cognizant of Your Honor's concerns
6 about the direction the case is going. You know, we've got a
7 ten percent hold-back now. It's not the amount of the 20
8 percent that scares us off. It's been the -- you know, the
9 U.S. Trustee asked for five percent at the outset. We said
10 okay. They came back several months ago and said, we'd like
11 you to increase it to ten. We said okay. We felt like they
12 were reasonable accommodations and we kind of feel like we're
13 being picked apart here and that -- and that --

14 THE COURT: I think their position is if you move the
15 case along then they'll relent, you know. I --

16 MR. SILVERSTEIN: False premise on that, Your Honor.

17 THE COURT: It's not. It's not.

18 MR. STROCHAK: The -- Your Honor, certainly if Your
19 Honor feels that it's necessary to protect these estates, you
20 know, we're not going to stand up here and stomp our feet over
21 ten percent more.

22 THE COURT: Mr. Silverstein is but --

23 MR. SILVERSTEIN: I'm not stomping my feet over it.

24 THE COURT: I'm teasing, Mr. Silverstein.

25 MR. STROCHAK: We do think given the posture of the

1 case, given the value that's here, and given the circumstances
2 that the reason we are where we are is because of the business
3 problem of financing the exit that it's not necessary at this
4 point. That's our view on the hold-back, Your Honor.

5 THE COURT: I'm going to sustain the U.S. Trustee's
6 objection and insist on the 20 percent hold-back as stated.
7 I'm prepared to revisit it after we get through the next cash
8 collateral. So when we get onto the next fee apps it's fair
9 game again. One shouldn't presume it because I'm agreeing with
10 the U.S. Trustee that the hold-back now should be 20 percent,
11 that it won't go in the reverse direction, go down if things
12 start to move forward.

13 MR. STROCHAK: Let me just make sure I understand
14 Your Honor's ruling. So it's 20 percent with respect to the
15 interim fee applications --

16 THE COURT: Yes, yes.

17 MR. STROCHAK: -- that are before Your Honor now.

18 THE COURT: Right.

19 MR. STROCHAK: But the hold-back with respect to the
20 ongoing monthly applications that's going to remain the same?
21 That's a ten percent hold-back.

22 THE COURT: No, I think it should be going forward
23 with 20 -- it's going to be 20 percent until the Court rules
24 otherwise and I'm happy to revisit it. And if you -- and if
25 as -- you know, if you can get a consensual cash collateral

1 order and then you want to bring back this issue of the amount
2 of percentage of the hold-back, I'm happy to hear you all on
3 short notice. Let's get through this. I want to get through
4 any cash -- contested cash collateral fi -- or consensual cash
5 collateral agreement before the hold-back going forward is
6 below the 20 percent.

7 MR. STROCHAK: All right. Thank you, Your Honor.

8 THE COURT: Okay.

9 MR. STROCHAK: I know Mr. Tischler is not here but I
10 hope he doesn't -- I hope he doesn't use this too much to his
11 advantage on a consensual order because I'm certainly motivated
12 now to get one, Your Honor.

13 MR. SILVERSTEIN: Just reflect the debtor's
14 [inaudible] commitment to counsel.

15 MR. STROCHAK: No. My point only, Your Honor, was
16 that we're certainly motivated to do everything we can to try
17 and do it consensually if we can, and so ...

18 THE COURT: All right.

19 MR. SILVERSTEIN: What I --

20 THE COURT: So --

21 MR. SILVERSTEIN: For the record, what I said was a
22 joke just a second ago. Thank you.

23 THE COURT: Go ahead, Mr. Strochak.

24 MR. STROCHAK: We --

25 THE COURT: You know where you stand on your fees,

1 right? The only thing you're going to get back, you're going
2 to talk to Mr. Strochak and see if you can work out what you're
3 going to submit to me --

4 MR. SILVERSTEIN: Yes, yes.

5 THE COURT: -- and --

6 MR. STROCHAK: Yes, we can do that. And as far as --

7 THE COURT: Testimonial expert.

8 MR. SILVERSTEIN: As far as this order it's somewhat
9 irrelevant because basically there's no new money coming to
10 anybody anyway so we'll deal with this in due course.

11 THE COURT: Okay. Go ahead, Mr. Strochak.

12 MR. STROCHAK: Shall we return to the Weil Gotshal
13 application?

14 THE COURT: Yes.

15 MR. STROCHAK: We were able to work out all the
16 issues with the United States Trustee and we've agreed to the
17 modest reductions that they've asked for in their application
18 so that's fine for us.

19 THE COURT: Let me just find my notes with respect to
20 it. They dinged you for \$11.69 in expenses, though.

21 MR. STROCHAK: Well, we agreed to it very quickly,
22 Your Honor.

23 THE COURT: I do have a question and that it was
24 something that's unclear is what did you bill for travel time.
25 I think we had this discuss -- and it was unclear to me that

1 the rule of thumb that I know my colleagues use and that I've
2 used is unless you're working that you bill half-time for
3 travel.

4 MR. STROCHAK: That's our policy and everything
5 that's in here should be billed at half-time for nonworking
6 travel.

7 THE COURT: All right. It was just unclear and
8 that's why I -- just wanted your confirmation that that was so.

9 All right. Mis -- as I understand it, you've agreed
10 to a \$655.50 reduction in fees.

11 MR. STROCHAK: Yes, Your Honor.

12 THE COURT: Okay. So with that, your application is
13 approved.

14 MR. STROCHAK: Thank you, Your Honor. We have the
15 two financial advisors remaining, W.Y. Campbell and Stout
16 Ricius.

17 THE COURT: All right. Okay.

18 MS. BACH: Your Honor, this is Allison Bach from
19 Dickinson Wright. I represent W.Y. Campbell and I'm here today
20 to answer any questions you might have with respect to W.Y.
21 Campbell's third interim fee application.

22 THE COURT: No. I see you've agreed with the U.S.
23 Trustee to a reduction of \$654.55 in expenses. Am I correct?

24 MS. BACH: That's correct.

25 THE COURT: Okay. And no adjustment in the fees and

1 with the change and expenses the application is approved.

2 MS. BACH: Thank you, Your Honor.

3 THE COURT: All right. Mr. Silverstein, are you
4 dealing with your advisors' application or not?

5 MR. SILVERSTEIN: I can, yes.

6 THE COURT: You don't need to. I mean, it's --

7 MR. STROCHAK: It's an easy job.

8 THE COURT: It's an easy job. There -- there was
9 no -- the U.S. Trustee didn't request --

10 MS. GASPARINI: No objection on our end.

11 THE COURT: -- any reduction. Okay. SRR submitted
12 time records in half-hour increments. The expenses in the
13 requests are all reasonable within the U.S. Trustee guidelines
14 and your application is approved as submitted.

15 Okay. All right. Is that it for today?

16 MR. STROCHAK: Looking at the end of the calendar,
17 Your Honor. It just occurred to me that Your Honor didn't ask
18 for an order on the Ceremelli lift stay. Is one necessary or
19 certainly the record is clear from Your Honor's decision.

20 THE COURT: I don't -- all right. We'll prepare it.
21 You say for the reasons stated on the record the motion to lift
22 the stay is denied. We'll just prepare it.

23 MR. STROCHAK: Thank you. We have orders to submit.
24 I think the fee application ones we'll just need to be adjusted
25 with the final numbers. So shall we just submit them to

1 chambers?

2 THE COURT: Yes.

3 MR. STROCHAK: Very good. And then I have an order
4 on the insurance I'll hand up.

5 THE COURT: Okay. Thank you. Anything else we need
6 to -- okay. Thank you very much.

7 MR. STROCHAK: Thank you, Your Honor.

8 (Proceedings concluded at 3:13 p.m.)

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1 I certify that the foregoing is a transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

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7 RUTH ANN HAGER

8 Dated: September 24, 2010
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